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No. 79-45

IN THE

Supreme Court of the United States

October Term, 1979

GERALD A. LEWIS, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida,

Appellant,

v.

BT INVESTMENT MANAGERS, INC., *et ano.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION, *AMICUS CURIAE,* IN SUPPORT OF THE MOTION TO AFFIRM

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This brief is filed under Rule 42(1) of the Rules of this Court with the consent of all the parties.

Interest of *Amicus Curiae*

The New York Clearing House Association, founded in 1853, is an association of twelve leading banks in the City of New York, each of which is owned by a bank holding

company.[1] The Association clears commercial drafts and items in the New York area and, through its counsel, files briefs before courts of appellate jurisdiction in cases that raise questions of law materially affecting banks or their affiliates.

The bank holding company organizations of which the Association's members are a part have a strong and direct interest in being able to compete in the offering of investment advisory, trust and other services throughout the Union, free of discriminatory state regulation unauthorized by Congress.

Statement

Appellee Bankers Trust New York Corporation ("Bankers"), a New York corporation principally conducting business in New York and a "bank holding company" within the meaning of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841 *et seq.* (the "Act"), seeks to offer investment advisory and trust services in Florida through local offices of a nonbank subsidiary (B2-7).[2] Bankers has been prevented from doing so by reason of the statutes held invalid below, Florida Statutes

[1] The members of the Association are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Manufacturers Hanover Trust Company, Irving Trust Company, Bankers Trust Company, Marine Midland Bank, United States Trust Company of New York, National Bank of North America and European American Bank & Trust Company.

[2] Appellee BT Investment Managers, Inc. is a Delaware subsidiary of Bankers formed for the purpose of conducting an investment advisory business in Florida (B2). "B," "C" and "D" citations are to the appendices to the Jurisdictional Statement ("JS") so entitled.

§ 659.141(1) (first sentence)[3] and § 660.10 (B4-7). Those statutes, reprinted at C1-4, in conjunction prohibit any bank holding company whose operations "are principally conducted outside" Florida from competing in the investment advisory and trust businesses in Florida.[4]

The district court held the statutes invalid under the Commerce Clause, as being in both purpose and effect purely "discriminatory protectionist legislation designed to promote local business to the exclusion of interstate competition and commerce" (B11). The court's conclusion as to purpose and effect is inescapable from the statutes themselves (see B12) and from the circumstances of the hurried amendment of § 659.141(1) (see B4-5, B15-16) and has been concurred in by both the Federal Reserve Board, 59 Fed. Res. Bull. 364, 366, and the Fifth Circuit, 559 F.2d 950, 954 & n.13, in earlier proceedings. The

[3] The judgment below did not extend to that portion of the first sentence of § 659.141(1) that prohibits out-of-state bank holding companies from acquiring *banks* located in Florida (D1-2). Congress has itself prohibited such acquisitions, absent affirmative legislative consent by a particular State. 12 U.S.C. § 1842(d).

[4] Although the district court declared both statutes unconstitutional, it enjoined the enforcement only of the relevant portion of § 659.141(1), finding that an injunction would be premature as to § 660.10 (B22). We agree with Appellant ("Florida") that all aspects of the decision below are now before the Court (JS at 8). As Florida acknowledges (JS at 14), however, it was the *combination* of § 659.141(1)—which prohibited Bankers from owning a Florida trust company—and § 660.10—which prohibited all corporations other than Florida banks and trust companies from rendering trust services within Florida—that wholly precluded Bankers from providing trust services in Florida, and it was that statutory preclusion which was invalidated and is in issue here. Whether § 660.10 in isolation would be constitutional was not raised or decided below, and thus the second of Florida's Questions Presented (JS at 4, discussed JS at 13-16) goes beyond the confines of the controversy between the parties and is not, in its broad terms, a question "on which decision of the cause depends" (see Rule 16(1)(c) of the Rules of this Court).

district court also rejected Florida's contention that Congress has consented to such otherwise unconstitutional discrimination (B17-21).

Florida and the Conference of State Bank Supervisors as *amicus curiae* ("State Supervisors") argue here both that Florida's discriminatory legislation is proper "regulation" under the Commerce Clause and that, in any event, Congress has consented to it, though they appear to rely more heavily on the second contention. Their constitutional argument rests on a distorted reading of this Court's controlling decisions, and their attempt to create congressional consent depends on a tortured analysis that wholly rejects the structure and language of the Act and its legislative history. Both arguments are plainly wrong and neither presents a question "so substantial as to require plenary consideration" by the Court (see Rule 15(1)(f) of the Rules of this Court).[5]

[5] Though it is immaterial to the substantiality of the legal questions presented, the fact is that *none* of the other state statutes listed by State Supervisors (Brief at 21) is comparable to Florida's legislative scheme (see note 4, page 3, *supra*) because none precludes out-of-state holding companies from offering investment advisory services through local offices and subsidiaries or from establishing local trust company subsidiaries. The majority of the statutes cited simply prevent out-of-state holding companies from acquiring in-state *banks* and as such are clearly valid in light of 12 U.S.C. § 1842(d) (see note 3, page 3, *supra*). The others merely prohibit out-of-state corporations from serving in certain fiduciary capacities. State Supervisors' assertion that the "rationale" of the decision below could jeopardize a "significant number" of these statutes (Brief at 21) is incorrect.

ARGUMENT

I.

Florida's Protectionist Statutes Are Invalid Under the Commerce Clause.

In the "few simple words of the Commerce Clause" the Framers carried out their determination that commerce among the States be subjected to the power of the Nation in order to thwart "the tendencies toward economic Balkanization" that had plagued the country before Independence and under the Articles of Confederation. *Hughes* v. *Oklahoma,* 441 U.S. —, 99 S.Ct. 1727, 1731 (April 24, 1979); *see Baldwin* v. *G.A.F. Seelig,* 294 U.S. 511, 522-23 (1935) (Cardozo, J.). To carry out that mandate, this Court has for nearly a century held that the Commerce Clause operates as a restriction on permissible state regulation even in the absence of conflicting federal legislation. *See, e.g., Wabash, St. Louis & Pacific Railway* v. *Illinois,* 118 U.S. 557 (1886); *Hughes* v. *Oklahoma, supra; see also Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 209 (1824) (Marshall, C.J.) (dictum).

Accordingly, the Court has consistently stricken down state legislation that restricts or bars interstate commerce while serving no local purpose other than the elimination of out-of-state competition. "[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. . . . The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." *City of Philadelphia* v. *New Jersey,* 437 U.S. 617, 624 (1978).

Florida's "brazen attempt"[6] legislatively to shield its local business interests from the prospect of interstate com-

[6] *See BT Investment Managers, Inc.* v. *Lewis,* 559 F.2d 950, 954 n.13 (5th Cir. 1977).

petition is, as recognized below, classic protectionism. On their face, the invalidated statutes discriminate against interstate commerce as such and have no other discernible purpose or effect. Indeed, they entirely deny firms located outside Florida the ability to do business in Florida, preserving that business for Florida-based firms.[7]

This case thus involves an actual prohibition of interstate commerce, not merely a burden (incidental or otherwise) on commerce, and presents at least as appropriate an occasion as *Philadelphia* v. *New Jersey* for application of a *per se* rule of invalidity.[8] Nothing in *Hughes* v. *Oklahoma,* handed down after the decision below and cited by Florida (JS at 17), or in *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137 (1970), relied on by State Supervisors (Brief at 12), suggests otherwise; indeed, application of the *Pike-Hughes*

[7] Florida cursorily attempts to argue that the statutory "burden falls equally on foreign and domestic businesses alike" (JS at 18) because the prohibitions of § 659.141(1) turn not on whether a company has incorporated outside Florida, but rather on whether its business operations are "principally conducted outside" Florida. The Florida legislature obviously chose the most commercially meaningful definition of a "non-Florida" firm in its discriminatory enactment; Florida's specious contention here merely highlights the fact that, for a company with a substantial interstate business, the statutory prohibition is unavoidable even by incorporating in Florida, and thus is total. Likewise, the "grandfather" provision pointed to by State Supervisors (Brief at 12), which in application is an extremely narrow exception, merely confirms that the legislative purpose and effect were to protect those now in the market from new competition.

[8] Two members of the Court considered the provision held invalid in *Philadelphia* v. *New Jersey* to be a public health measure, not a regulation of "commerce" in the normal sense and certainly not designed to protect the economic interests of New Jersey's commercial community. They would have held that it did not unlawfully burden commerce—although it wholly precluded the commerce involved—in merely allowing locally generated waste, which had to be disposed of somehow, to continue to be used as landfill within the state. 437 U.S. at 629-33 (Rehnquist, J., dissenting). No such analysis is possible here; Florida's sole purpose and effect is the prohibition of interstate commerce.

three-point test, *see* 99 S.Ct. at 1736, confirms the patent (*i.e., per se*) invalidity of Florida's protectionist scheme:

> (1) The challenged statutory scheme does not regulate "evenhandedly"; indeed, it does not "regulate" at all except by discriminating against interstate commerce on its face *and* in effect.
>
> (2) The statute serves no "legitimate local purpose"; its only purpose is protection of local business interests against competition from interstate firms.
>
> (3) The availability of less discriminatory alternatives is not even raised since there is no "legitimate" local purpose, merely the purpose and effect of precluding competition by interstate firms.[9]

Application of the "balancing test" urged by State Supervisors (Brief at 12) thus leads simply to the conclusion that the statutes are in fact *per se* invalid.[10]

[9] Florida has not here advanced its novel—indeed, almost Orwellian—economic contention below that statutes limiting the number of competitors were intended to enhance competition (see B12). Even had that been Florida's purpose, the statutes are not "evenhanded," their effect on interstate commerce is not "incidental," and the availability of nondiscriminatory alternatives is obvious (*e.g.,* regulatory supervision of all competitors and vigorous enforcement by the State of state and federal antitrust laws). Moreover, discrimination against interstate commerce having been established, the burden was on Florida to show both concrete local benefits and "the unavailability of nondiscriminatory alternatives adequate to preserve" those benefits. *Hughes, supra,* 99 S. Ct. at 1736.

The district court, in addition to finding that Florida's only purpose was discrimination, found that Florida lacked any factual basis for its contention that the statutes were necessary and appropriate to the alleged objective of preserving competition (B14-15); far from being clearly erroneous, these findings are irrefutable, as Florida apparently concedes.

[10] The dissent in *Hughes* is in no way inconsistent with this analysis, which has been common ground in the Court's commerce clause decisions. Rather, Mr. Justice Rehnquist's opinion rested, *inter alia,* on the long-recognized special state interest in wildlife conservation, the fact that the statute in question applied equally to local and multistate firms and the fact that it was *not* designed "for the benefit of the local economy." 99 S.Ct. at 1739-41.

Nor does *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978), upon which both Florida and State Supervisors rely, lend even superficial support to their position. *Exxon* does not authorize States to "discriminate against some, but not all, out-of-state business enterprises by preventing them from controlling in-state facilities" (State Supervisors at 10; see JS at 19); as the Court recognized, the statute there did not discriminate against out-of-state firms at all. 437 U.S. at 125, 126 n.16. Rather, Maryland, to serve a legitimate local purpose, *id.* at 121, 125, legislated against all vertically integrated firms, whether Maryland-based or out-of-state. The fact that all integrated firms were out-of-state firms was truly "incidental" to the legitimate regulatory purpose of the legislation, and non-integrated interstate firms were treated exactly as were Maryland-based non-integrated firms, with the latter afforded "no competitive advantage" over the former. *Id.* at 125-26.

Florida has not sought to exclude Florida firms otherwise similarly situated to Bankers (*i.e.*, Florida-based bank holding companies) from the trust and investment advisory businesses. Florida has acted not against economically *integrated* business but against *interstate* businesses. Discrimination against interstate commerce to confer a competitive advantage on Florida's own business community is the sole purpose and effect of the statutes. *Cf. id.* at 126.[11] They are, as held below, invalid.

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[11] State Supervisors' assertion that the Florida statutory scheme is valid because it permits out-of-state individuals and certain out-of-state corporations to own Florida trust companies and offer investment advisory services in Florida ignores these unavoidable facts and thus could not be farther from the mark (Brief at 11; see also JS at 19). The Commerce Clause is not "satisfied so long as some out-of-state control is possible" (*id.*), particularly when those for whom such "control" is theoretically possible are the least likely to

(footnote continued on following page)

We note, finally, that neither the district court nor Bankers has disagreed with the propositions that the businesses here involved are affected by the public interest, are traditional areas of state regulation, and are undoubtedly subject to Florida's police power—though, as we discuss below, State Supervisors are wrong in saying (Brief at 7, 13) that this case involves state control of banking. Bankers has demanded and the district court has required only that Florida exercise its police power in conformity with the Constitution. That requirement hardly presents an issue for this Court.

II.

Congress Has Not Authorized the States To Discriminate Against the Nonbank Subsidiaries of Out-of-State Bank Holding Companies.

Florida and State Supervisors would have the Court find congressional consent to Florida's patent discrimination against interstate commerce in § 3(d) and § 7 of the Act,

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be effective competitors; it requires more—an absence of discrimination against interstate commerce, as such, to advantage local economic interests. Florida has bluntly discriminated against commerce by treating functionally identical in-state and out-of-state firms completely differently so as to keep the latter from competing in Florida at all.

State Supervisors also advance the faint argument that, in denying "outlets" within the state to Bankers, Florida has not interrupted the flow of interstate commerce (Brief at 10-11, 14; see also JS at 19). This is frivolous. Florida's action entirely prevents Bankers and other out-of-state bank holding companies from delivering the very personal services involved here to Florida consumers; even the very rich have no desire to fly to New York whenever they want to meet with a trust officers or investment advisor. State Supervisors' attempt to create a commerce clause distinction between the flow of commerce and the operation of retail outlets is baseless; could Florida protect its local merchants from competition by prohibiting the entry of out-of-state supermarkets or department stores?

12 U.S.C. §§ 1842(d), 1846. Section 3(d), which pertains to the formation or acquisition of *banks* by bank holding companies, simply has nothing to do with this case because this case has nothing to do with the formation or acquisition of a bank. Section 7, which merely allows the exercise of otherwise legitimate state authority—at least to the extent not inconsistent with the Act—likewise has no bearing here since the States have no authority under the Constitution to discriminate against interstate commerce for the benefit of local business interests.

STRUCTURE OF THE BANK HOLDING COMPANY ACT. In the Act, Congress has classified the subsidiaries of bank holding companies into two categories: (1) "banks" and (2) all others, *i.e.*, those doing such nonbanking businesses as may be authorized by the Federal Reserve Board, pursuant to the limitations and standards of the Act. Section 3 of the Act regulates the formation and acquisition of "bank" subsidiaries, and § 4 limits and regulates the other, nonbanking, businesses that may be organized or acquired by holding companies. The nonbanking activities sanctioned by § 4 include investment advisory and trust services, as the Federal Reserve Board has by regulation declared. 12 C.F.R. § 225.4(a)(4), (5). Florida and State Supervisors here call upon the Court to rewrite the Act and to eliminate the sharp distinction Congress has thus drawn.

SECTION 3(D). This subsection of § 3 prohibits holding companies from crossing State lines in their ownership of "bank" subsidiaries, unless the State of the bank to be acquired or organized has by statute waived the prohibition. Florida and State Supervisors urge that this narrow state role—to *waive* the restriction of § 3(d)—also includes the power to *extend* it to § 4 activities, so that out-of-state bank holding companies may constitutionally be barred from acquiring or organizing nonbank subsidiaries within the State. This contention is nonsense:

First, the prohibition of § 3(d) applies by its plain language only to holding companies' acquisitions of "banks," a term Congress carefully defines in § 2(c) of the Act as

> "any institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 12 U.S.C. § 1841(c).

Neither Florida nor State Supervisors contend that Bankers seeks to own and operate in Florida a business that would be a "bank" within the meaning of § 2(c); they argue that the term is or should be construed more broadly than Congress, in specific terms, has defined it. This, Florida says, is necessary to close a "loophole." (State Supervisors at 17-18; JS at 10) [12]

The attempt to substitute in § 3(d) a different, and unusual, meaning for the word "bank" than that which is prescribed in the preceding section of the Act does not merely contravene established principles of statutory construction and common sense; it is an effort to have the Court reject Congress' basic statutory plan.

Similarly, State Supervisors' attempt (Brief at 17) to invoke the Court's discussion of "commercial banking" in *United States* v. *Philadelphia National Bank,* 374 U.S. 321 (1963), is remarkable in light of that case's holding: companies that offer some of the "cluster" of services that com-

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[12] State Supervisors also attempt to manipulate legislative history to justify an interpretation of § 3(d) that contrasts sharply with its plain meaning (Brief at 17-18). In fact, the legislative history reinforces the plain meaning by demonstrating that § 3(d) was enacted to eliminate a concern that the general McFadden Act restriction on *bank* branching across state lines would be subverted by multi-state bank holding companies. 102 CONG. REC. 6860 (remarks of Sen. Douglas) (1956); see H.R. REP. No. 609, 84th Cong., 1st Sess. 24 (1955) (discussing § 5(c) of H.R. 6227).

prise "commercial banking"—including "trust administration" and "investment advice"—are not within the line of commerce of "commercial banking" unless they *also* accept demand deposits and make commercial loans, which the Court held to be essential elements of the activity of "commercial banking." 374 U.S. at 356-57 & n.33. The other cases they cite are equally inapposite.[13]

The "loophole" argument is but Florida's way of saying that it disagrees with the policy decision made by Congress to treat differently the banking and nonbanking activities of bank holding companies. The "loophole" is the law.

Second, the attempt to expand the prohibition of § 3(d) to encompass nonbank subsidiaries disregards the language of § 3(d): "no application shall be approved under *this section*"—*i.e.*, § 3, which as noted above governs only the

[13] For example, State Supervisors cite to *Iowa Independent Bankers* v. *Board of Governors of the Federal Reserve System,* 511 F.2d 1288 (D.C. Cir.), *cert. denied,* 423 U.S. 875 (1975), in aid of their statement that "Other courts have not construed section 3(d) as narrowly as did the court below" (Brief at 18). The question in *Iowa Independent Bankers* was whether Iowa, acting under § 3(d), could by statute prohibit some but not all out-of-state holding companies from acquiring *banks* within Iowa. The question of non-bank subsidiaries was not present in the case and State Supervisors' attempt to suggest otherwise—indeed, their implication that the court "held" otherwise—is misleading.

Florida's strong reliance on *Investment Company Institute* v. *Board of Governors of the Federal Reserve System,* [Current] FED. SEC. L. REP. (CCH) ¶ 96,813 (D.C. Cir. 1979) and similar cases (JS at 8-13), is equally unavailing. Those cases decided whether certain *types* of nonbanking activities were so closely related to banking as to be permissible for bank holding companies under § 4, not whether a State may preclude out-of-state holding companies from engaging in activities that in-state holding companies may conduct under both § 4 and applicable state law. The "straw man" issue stressed by Florida—whether the 1970 amendments to the Act liberalized the *types* of activities in which bank holding companies can engage—is irrelevant to this case. The only issue here is the constitutionality of state geographical barriers to admittedly permissible activities—activities permitted by Florida to its own companies.

formation or acquisition of *banks.* Section 4 regulates holding companies' entry into nonbanking ventures such as investment advice and trust administration, and that section contains no restriction comparable to § 3(d).[14]

Third, were § 3(d) not limited to holding companies' acquisitions of "banks" (as defined), its flat prohibition would already operate to prohibit Bankers' proposed Florida operations. If, as Florida and State Supervisors suggest, Congress intended § 3(d) to have that effect, there would be no need for Florida's own legislative prohibitions. The authors of the hasty amendment to § 659.141(1), Florida's legislators and bankers, unmistakably understood what Florida's advocates do not.

SECTION 7. In their faltering effort to demonstrate that Congress intended to sanction Florida's discrimination against interstate commerce, Florida and State Supervisors grasp as well at § 7 of the Act, 12 U.S.C. § 1846. State Supervisors argue in the face of clearly contrary statutory language and legislative history that § 7 constitutes "an affirmative grant of power to burden interstate commerce in an otherwise unconstitutional manner" (Brief at 19).

Again, they are plainly wrong. As the legislative history makes abundantly clear, § 7 was not intended to grant new authority to the States, but only "to *preserve* to the States those powers which they now have in our dual banking system." S. REP. No. 1095 (Part 2), 84th Cong., 2d Sess.

[14] The question of whether § 3 or § 4 governs an application is not, even apart from § 3(d), merely an administrative technicality, since the two sections specify different criteria by which applications are to be judged.

5 (1956) (emphasis added).[15] The plain language of the section unambiguously carries out that purpose:

> "The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof."

Thus, the only state legislation permitted by § 7 is that which would have been permitted absent enactment of the Act, *i.e.*, that which passes muster under the Commerce Clause without aid of congressional authorization, which the Florida statutory scheme does not. A section of the Act that merely preserves the otherwise lawful "powers and jurisdiction" of the States over "banks, bank holding companies, and subsidiaries" cannot by mere assertion be transformed into a section that adds substantial new powers of otherwise unconstitutional breadth.

* * *

"This case presents the narrow question of what Congress did, not what it could do." *FTC* v. *Bunte Brothers, Inc.*, 312 U.S. 349, 355 (1941). What Congress did here is quite clear; it limited to "banks" the States' power to exclude subsidiaries of bank holding companies. It did not authorize unconstitutional discrimination against interstate commerce in trust and investment advisory services such as Florida seeks to enforce.

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[15] The Senate Report further states with respect to § 7:

> "The intent of the committee was to make it clear that a State could not enact legislation inconsistent with the bill and therefore nullify its effect. . . . [Y]our committee reiterates its view that section 7 in no way permits States to exercise such powers and jurisdiction in a manner inconsistent with this proposed legislation." *Id.*

Conclusion

The decision below fully accords with this Court's controlling decisions under the Commerce Clause. The construction of the Bank Holding Company Act proposed by Florida and State Supervisors is patently wrong. Consequently, Florida has failed to establish that the questions presented are "so substantial" as to warrant plenary consideration, and the motion to affirm should be granted.

Respectfully submitted,

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